

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT PERMIT
DENIED BY THE TOWN OF FRIDAY
HARBOR TO FRONT STREET INN, INC.,

FRONT STREET INN, INC.,

Appellant,

v.

TOWN OF FRIDAY HARBOR,

Respondent,

and

SHORELINE DEFENSE FUND,

Intervenor.

SHB No. 87-27

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER, the request for review of the denial of a shoreline substantial development permit, came on for hearing before the Shorelines Hearings Board, Wick Dufford, Chairman, and Lawrence J. Faulk, Judith A. Bendor, Nancy Burnett, Richard Gidley, and William E. Derry, Members, convened at Friday Harbor, Washington on February 22, 23, and 24, 1988.

William A. Harrison, Administrative Appeals Judge presided.

1 Appellant Front Street Inn appeared by William Giesy, Principal.
2 Respondent Town of Friday Harbor appeared by Ronald D. Gordon,
3 Attorney at Law. Intervenor Shoreline Defense Fund appeared by Peter
4 J. Eglick, Attorney at Law. Reporters Betty Koharski and Cheri L.
5 Davidson recorded the proceedings.

6 Witnesses were sworn and testified. Exhibits were examined. From
7 testimony heard and exhibits examined, the Shorelines Hearings Board
8 makes these

9 FINDINGS OF FACT

10 I

11 This matter is the sequel to our prior decision in Schwinge v.
12 Town of Friday Harbor, SHB No. 84-31 (1985). In Schwinge the present
13 appellants, Messrs. Gislason and Giesy, applied to the Town of Friday
14 Harbor for a shoreline substantial development permit for a 34-unit
15 inn to be located at the corner of Front and Spring Streets in Friday
16 Harbor. The Town approved that application. The Town's approval was
17 appealed to this Board. We reversed on review.

18 II

19 The basis for our reversal in Schwinge was not the proposed use of
20 the site for an inn. The holding in Schwinge, and on pre-hearing
21 motions here, was that the use of the site for an inn has not been
22 shown to be inconsistent with the Friday Harbor Shoreline Master
23 Program (FHSMP) or the Shoreline Management Act.

III

The basis for our reversal in Schwinge was the height and view impact of the specific inn proposed, together with its parking scheme and impact on traffic circulation. Public notice of proceedings before the Town and adequacy of the environmental impact statement were also reviewed but, again, in the context of the specific inn proposal.

IV

Following our decision in Schwinge, Messrs. Gislason and Giesy submitted a new application to the Town for an inn of 26 units (reduced from 34 units). The proposal was for the same site as previously. Also as previously, there would be a parking level excavated into the sloping lot with three levels of guest rooms above. The third level of guest rooms was reduced from an entire floor, as previously, to a three room grouping referred to in testimony here as the "pop-up". The plans submitted to the Town show that the overall height of the building, including parapets, exceeds the 27 - foot height limitation set forth in the Town zoning code.

V

The sloping nature of the lot in question allows construction of the proposed parking level to be generally below grade at the uphill end adjacent to other Town buildings. Thus, two levels of guest rooms

1 above the parking level would, with careful design, constitute a scale
2 consistent with the two-story character of the Town's business
3 district in which the inn is proposed. The third level of guest rooms
4 ("pop-up") renders the scale of this proposal inconsistent with the
5 two-story character of the Town, and results in correspondingly
6 greater blockage of public views. Some public view and private views,
7 such as from the parlor of the nearby San Juan Inn, would necessarily
8 be affected by development of a building on this site comparable in
9 scale to the other buildings comprising the Town's business district.

10 VI

11 The environmental impact statement (EIS) for this 26 - unit
12 proposal did not consider any alternative of fewer units nor lesser
13 scale. Neither the EIS nor the other evidence before us establishes
14 that an inn with two levels of guest rooms (lacking the "pop-up")
15 would be economically infeasible.

16 VII

17 The EIS also did not analyze the relationship of the proposal to
18 existing comprehensive plans or the shoreline master program. The
19 proposal's appearance, particularly with regard to view, was not
20 presented accurately in the EIS.

VIII

As proposed to the Town, there would be 13 on-site parking spaces on the parking level. This would be less than the one-space-per-unit rule of the Town zoning code. Parking is generally difficult to find in the Town's business district.

IX

The flow of cars and pedestrians from arriving ferry boats must presently pass through the intersection of Front and Spring Streets adjacent to the site. That street intersection is presently congested and difficult to negotiate during ferry boat arrivals. The intersection involves a traffic circle within which there is a park with benches, trees and other features.

X

Notice of the shoreline application was given by posting and publishing. On June 15, 1987, the Town denied the shoreline application for the 26 - unit inn. Messrs. Gislason and Giesy requested review from this Board by notice filed July 16, 1987.

XI

After the Town denied the shoreline application, it granted a variance to its Town zoning ordinance in regards to parking at the proposed inn. By this action appellants received permission to locate 19 parking spaces on the parking level provided that 10 off-site

spaces were located in the core area of the Town. As of the present time neither the 10 off-site spaces nor a specific location for them has been established.

XII

It is improbable that 19 parking spaces could be established on the proposed parking level. The establishment of 19 spaces would require increasing the depth of the parking level from 58 feet shown in this proposal (page 3 of plans, Exhibit R-5) to 63 feet in order to accomodate 7 stalls, each 9 feet wide, as depicted in the 19 - space parking plan contained in the EIS (Attachment 3, plan A). Moreover, the combination of lane width, unknown placement of supporting pillars and possible alignment of the parking level 2 feet below street level render the 19 - space parking plan infeasible as now proposed. This infeasibility would affect nearby traffic circulation adversely and add to the congestion during ferry boat arrivals. Traffic congestion would also be aggravated by the 17 foot clearance between the traffic circle park and the proposed development. This should be a minimum of 24 feet to allow adequate traffic clearance.

XIII

The operation of the parking process during loading and unloading was unclear. Valet service to expedite arrivals and departures was not addressed in this proposal.

XIV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board, comes to these

CONCLUSIONS OF LAW

I

Notice. Notice of the application for shoreline development was consistent with the Shoreline Management Act and State Environmental Policy Act except as to issuance of the parking variance which is addressed separately in these conclusions. (See Conclusion of Law IV, below).

II

Environmental Impact Statement Adequacy. The environmental impact statement in this matter is inconsistent with WAC 197-11-440(5)(b) of SEPA regulations requiring consideration of reasonable alternatives that could feasibly attain or approximate a proposal's objective but at a lower environmental cost or decreased level of environmental degradation. Specifically, no alternative inn of lesser size or scale than the proposal was considered in the EIS. Neither were such lesser alternatives affirmatively shown to be economically infeasible so as to justify their exclusion from the EIS.

The EIS is also inaccurate in depicting the view restriction which

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CONCLUSIONS OF LAW & ORDER

(7)

1 would result from the proposal, particularly in regard to the size of
2 the "pop-up" which constitutes the third level of guest rooms.

3 The EIS does not sufficiently disclose, discuss and substantiate
4 the environmental effects of the proposed inn and reasonable
5 alternatives, and is therefore inadequate. See Barrie v. Kitsap
6 County 93 Wn. 2d 843, 854, 613 P.2d 1148 (1980).

7 III

8 Height and View. The proposed inn remains out of scale with the
9 other buildings of the Town because of the third level of guest rooms
10 (the "pop-up"). Because of this, the proposal reduces views
11 inconsistently with; FHSMP Section 5.07, Policy 3, page 29 and FHSMP
12 Section 3.03, Policy 7, page 5 and FHSMP Section 3.07, Policy 4, page
13 9 all as made applicable to commercial development by the Regulation
14 for Urban Environment of Section 5.07, page 30. In so concluding,
15 however, we do not construe the FHSMP provisions cited in this matter
16 to establish a rule that no view, public or private, may be reduced by
17 development of an inn on the site in question. As we have held
18 previously in Schwinge, the FHSMP protects against view blockage from
19 out of scale buildings. Under the FHSMP provisions cited in this
20 matter, neither public views from Spring Street nor private views from
21 the San Juan Inn are protected from reduction by an inn on the site
22 which is of a scale consistent with the two story character of the
23 Town's business district.

IV

Parking and Traffic. As in Schwinge previously, the inn proposal now before us is without a final parking plan. Lacking a final parking plan, the shoreline application is inadequate for the Town or this Board to determine the consistency of the proposed development with the traffic and parking policy and regulations of the FHSMP. See FHSMP Section 15.19, page 58.

The Town's grant of a zoning variance for parking after denial of the shoreline application was procedurally inconsistent with the SMA if intended to revive the shoreline application. This is so because the scheme of 19 spaces on-site with 10 spaces off-site was not given voice in either the public notice of the shoreline application or in the EIS or at any time prior to the Town's denial of the shoreline application.

Substantively, however, the FHSMP does not prohibit at least a further shoreline application which combines on-site and off-site parking for procedurally correct consideration by the Town. Any such reapplication should involve a parking plan which is a) final at the time of Town action on the shoreline application and b) treated adequately in public notices, shoreline application and EIS and c) fully informative as to the operation of parking (such as whether there would be valet parking) and the physical limitations affecting parking (such as lane widths, space taken by columns and posts, level

1 of parking below street level and size of the parking area). Because
2 of potential traffic impacts on the shoreline, these factors are
3 relevant to the shoreline approval process in addition to any
4 relevancy which these may have in the building permit process. The
5 same is true of street clearance between the proposal and the traffic
6 circle park within the intersection of Front and Spring Streets. See
7 FHSMP Section 3.05, Policy 5, page 7.

8 The parking plan associated with this proposal is not final and
9 has not been shown to be consistent with the FHSMP, Section 5.19, page
10 58, as made applicable to commercial development by the Regulation for
11 Urban environment of Section 5.07, page 30.

12 V

13 Any Findings of Fact which is deemed a Conclusion of Law is hereby
14 adopted as such.

15 From these conclusions of Law the Board enters this
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ORDER

The denial by the Town of Friday Harbor of this application by the Front Street Inn for a shoreline substantial development permit is hereby affirmed.

DONE at Lacey, Washington this 7 day of April, 1988.

SHORELINES HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Chairman

Lawrence J. Faulk 4/7/88
LAWRENCE J. FAULK, Member

Judith A. Bendor
JUDITH A. BENDOR, Member

Nancy Burnett
NANCY BURNETT, Member

Richard Gidley
RICHARD GIDLEY, Member

William E. Derry
WILLIAM E. DERRY, Member

William A. Harrison

WILLIAM A. HARRISON
Administrative Appeals Judge

SHB 87-27
FINAL FINDING OF FACT
CONCLUSIONS OF LAW & ORDER

(11)

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

Front Street Inn, Inc.

Appellant

v.

Town of Friday Harbor

Respondent

and

Shoreline Defense Fund

Intervenor

SHB No. 87-27

ORDER OF PARTIAL
SUMMARY JUDGMENT

On November 24, 1987, appellant Front Street Inn filed its Motion for Summary Judgment Granting Permit. Having considered this together with attached exhibits and:

1. Brief of Respondent, Town of Friday Harbor, with attached affidavits.
2. Memorandum in Opposition to Motion for Summary Judgment of intervenors, Shoreline Defense Fund and Motion to Intervene with Declaration and being fully advised, the Board hereby finds:

1. That this matter arises in direct succession from the matter of Schwinge and Department of Ecology v. Town of Friday Harbor, Glesy, and Gislason, SHB No. 84-31 (1985).

1 2. Following a three day hearing in Schwinge, above the Board
2 reversed a shoreline substantial development permit granted by the
3 Town of Friday Harbor for an inn proposed by the same applicants
4 (Mssrs. Giesy and Gislason) as are now again before us.

5 3. In Schwinge the Board received extensive argument and evidence
6 concerning 1) use of the site for an inn and 2) the impacts of the
7 specific inn proposal then before us, chiefly as regards view and
8 traffic considerations.

9 4. In Schwinge, the permit was reversed due to the impacts of the
10 specific inn proposal then before us. Yet we actually and necessarily
11 resolved, in Schwinge, the threshold question of whether an inn is an
12 appropriate type of use. We held, after consideration of the local
13 master program and Shoreline Mangement Act that use of the site for an
14 inn had not been shown to be inconsistent with either the master
15 program or Act.

16 5. Our decision in Schwinge was appealed to the Superior Court of
17 Thurston County by the applicants, Mssrs. Giesy and Gislason. Their
18 appeal was dismissed by the court upon procedural grounds.

19 6. In this matter, Front Street Inn v. Town of Friday Harbor and
20 Shoreline Defense Fund, SHB No. 87-27, the same applicants. Mssrs.
21 Giesy, and Gislason, dba Front Street Inn have applied to the Town of
22 Friday Harbor for a shoreline permit to build an inn of revised
23 design. This application was denied by the Town. In doing so,

1 however, the Town has raised issues pertinent to both 1) the use of
2 the site for an inn and 2) the impacts of the specific inn proposal
3 now before us. Intervenor, composed of Mr. Schwinge and other
4 persons with the same right of protection under the Act and master
5 program, as regards this site, urge the same issues. The issues are
6 set forth in the Pre-Hearing Order entered November 6, 1987.

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8 Wherefore the Board concludes:

9 1. Collateral Estoppel

10 a. The doctrine of collateral estoppel prevents a second
11 litigation of issues even though a different claim or cause of action
12 is asserted. Trautman, Claim and Issue Preclusion in Washington. 60
13 Wn. L. Rev. 805, 829. Affirmative answers must be given to four
14 questions before collateral estoppel is applicable:

15 (1) Was the issue decided in the prior adjudication
16 identical with the one presented in the action in
17 question? (2) Was there a final judgment on the
18 merits? (3) Was the party against whom the plea is
19 asserted a party or in privity with a party to the
20 prior adjudication? (4) Will the application of the
21 doctrine not work an injustice on the party against
22 whom the doctrine is to be applied?

23 Rains v. State, 100 Wn. 2d 660, 665 (1983).

24 b. Collateral estoppel applies to the decisions of
25 quasi-judicial, administrative tribunals. State v. Dupard, 93 Wn. 2d
26 268 (1980). Charles Pankow, Inc. v. Holman Properties, Inc., 13 Wn.

1 App. 537 (1975). Collateral estoppel applies to the decisions of this
2 Board. Wilcox, et.al. v. Yakima County and Department of Highways,
3 SHB No. 77-28.

4 c. The issues decided by Findings X through XIV and
5 Conclusion of Law III in the prior adjudication, Schwinge, are
6 identical with issues 3,4 and 5 of the Pre-Hearing Order in this
7 matter. These issues relate to use of the site for an inn, generally.

8 d. There was a final judgment in Schwinge which was not
9 altered by appeal.

10 e. The Town of Friday Harbor was a party in the Schwinge
11 adjudication. The Shoreline Defense Fund's members are residents of
12 San Juan County and include persons who own property adjacent to or
13 nearby the site in question, and who use the shoreline and areas
14 nearby the site, and who may be affected by the proposal's impact upon
15 view and traffic. (Page 2, lines 4-12, Declaration of Peter J. Eglick
16 dated December 7, 1987.) Yet this only establishes the identity of
17 their interests with the interests of Mr. Schwinge in the prior
18 action. Mr. Schwinge is apparently a leading member of the Fund.
19 Accordingly, we hold that the Fund is in privity with Mr. Schwinge, a
20 party to the prior action. See Bergh v. State 21 Wn. App. 393 (1978)
21 and Trautman, Supra, at page 836.

1 f. The application of the doctrine of collateral
2 estoppel to bar relitigation of issues 3, 4 and 5 will not work an
3 injustice against the Town and Fund in this matter. To the contrary,
4 the injustice would lie in permitting the proffered collateral attack.

5 g. Summary judgment under the doctrine of collateral
6 estoppel should be granted to appellant, Front Street Inn, on issues
7 3, 4 and 5 of the Pre-Hearing Order.

8 2. No Genuine Issue of Material Fact

9 a. There is no genuine issue of material fact to thwart
10 the finding that what is proposed is an inn.

11 b. Issues 1 and 2 of the Pre-Hearing Order raise
12 requirements for protecting long term benefits to the public (Master
13 Program Section 3.02 Policy No. 1) and to assure protection of the
14 unique character of Friday Harbor and participation by community
15 residents (Master Program Section 3.03).

16 c. We hold, as a matter of law, that the use of the site
17 for an inn, generally, is consistent with these provisions.

18 d. Summary judgment should be granted to appellant,
19 Front Street Inn on issues 1 and 2 so far as these relate to the use
20 of the site for an inn, generally.

21 e. Summary judgment should be denied on issues 1 and 2
22 so far as these relate to the impacts of the specific inn proposed in
23 this matter.

1 3. Issues of Material Fact

2 a. There are genuine issues of material fact regarding
3 issues 6 and 7 of the Pre-Hearing Order which relate to view and
4 parking, which by their nature relate to the impacts, of the specific
5 inn proposed in this matter.

6 b. Summary judgment should be denied on issues 6 and 7.

7 NOW THEREFORE IT IS ORDERED that:

8 1. Summary judgment is granted to appellant, Friday
9 Harbor Inn, on issues 3, 4 and 5 of the Pre-Hearing
10 Order entered November 6, 1987.

11 2. Summary judgment is granted to appellant, Friday
12 Harbor Inn, on issues 1 and 2 of the Pre-Hearing Order
13 entered November 6, 1987, in so far as these issues
14 relate to use of the site for an inn, generally.

15 3. Summary judgment is denied on issues 1 and 2 of the
16 Pre-Hearing Order entered November 6, 1987, in so far
17 as these issues relate to the impacts of the specific
18 inn proposed in this matter. Summary judgment is
19 likewise denied as to issues 6 and 7 of the Pre-Hearing
20 Order entered November 6, 1987, subjects which relate
21 to the impacts of the specific inn proposed.
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DONE at Lacey, Washington this 12th day of January, 1980.

SHORELINES HEARING BOARD

Wick Dufford
WICK DUFFORD, Chairman

Lawrence J. Faulk 1/8/87
LAWRENCE J. FAULK, Member

(See Dissenting Opinion)
JUDITH A. BENDOR, Member

Nancy Burnett
NANCY BURNETT, Member

Robert C. Schofield
ROBERT C. SCHOFIELD, Member

(See Dissenting Opinion)
DENNIS McLERRAN, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

Judith A. Bendor and Dennis McLerran, Members
(Dissenting Opinion)

We conclude that partial summary judgment should be denied and we therefore dissent.

I

An order granting partial summary judgement, based on the use of offensive collateral estoppel, preventing the litigation of certain legal issues, is a measure to be used with considerable caution. Only when the moving party has met its burden to clearly establish all the elements necessary for an application of offensive collateral estoppel, should the doctrine be applied to support summary judgment.¹ All material evidence and reasonable inferences must be construed in favor of the non-moving party. Hontz v. State, 105 Wn.2d 302, 714 P.2d 1176 (1986). We find that appellant Front Street Inn., Inc., has failed to sustain that burden.

II

Moreover, we conclude that it is improper to grant partial summary judgment because to do so violates public policy and renders an injustice. See, Mallard v. Retirement Systems, 103 Wn.2d 484,

1. The majority opinion also concludes that Partial Summary Judgment should be granted as a matter of law. (Parag. 2 at 5). Since that conclusion is, in fact, founded (sub silentio) on collateral estoppel, our opinion will only address that doctrine.

1 494 P.2d 16 (1985); State v. Dupard, 93 Wn.2d 268, 609 P.2d 961
2 (1980). Summary judgment in this instance thwarts the integrity of an
3 informed local review process, one founded upon adequate notice,
4 undertaken pursuant to the State Environmental Policy Act ("SEPA",
5 Chpt. 43.21C RCW), the Shoreline Mangement Act ("SMA", Chapt. 90.58
6 RCW), the Town of Friday Harbors' Shoreline Master Program, and
7 regulations relevant thereto.

8 III

9 A brief procedural history is merited. The related case is
10 Schwinge and Department of Ecology v. Town of Friday Harbor, Giesy and
11 Gisalsen, SHB No. 84-31 (1985). In Schwinge, appellants Schwinge and
12 DOE successfully prevailed, and the shoreline permit issued by Friday
13 Harbor for a 36 room inn was reversed and remanded. In so doing, the
14 Board concluded that the Environmental Impact Statement ("EIS") was
15 improperly not sent to DOE, and therefore WAC 197-10-460(1)(a) was
16 violated. (Parag. II at 12; See also, WAC 197-11-455(1)(a)). The EIS
17 also failed to describe several other reasonable alternatives to the
18 proposal, violating RCW 43.21C.030(2)(c)(iii) and its implementing
19 regulations. (Parag. XIX at 8-9).

20 Moreover, notice of the permit application and the public hearing
21 at the local level was inadequate, violating RCW 90.48.140(4) and WAC
22 173-14-070. (Parag. I at 11-12). Adequate notice is a critical
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1 | procedural requirement, one which cannot be cured by this Board's de
2 | novo review. South Point Coalition, et al. v. Jefferson County, et
3 | al., SHB No. 86-47, Order Granting Summary Judgment (May 26, 1987;
4 | permit vacated).

5 | IV

6 | After remand and procedures at the local level, Friday Harbor
7 | denied the issuance of a permit for a 26 unit inn. Front Street Inn,
8 | Inc., appealed, which then became our SHB No. 87-37. As a result, the
9 | parties are in a different posture then previously, and the burden is
10 | now on the permit seekers.

11 | Shoreline Defense Fund ("SDF") has moved to intervene. It is
12 | uncontroverted that SDF is composed of residents of San Juan County,
13 | some of whom own property in the town near the proposed inn. Members
14 | use the shoreline near the inn. The Schwinges, appellants in the
15 | predecessor case, have a representative on the SDF Board which
16 | includes seven other individuals - none of whom were parties in SHB
17 | No. 84-31. There is no evidence whatsoever in the record that the
18 | Schwinges or SDF have been or are agents of each other.

19 | Moreover, in SHB No. 84-31, the harm to the Schwinges was that a
20 | substantial number of guests at their inn would be deprived of a view
21 | of the harbor, an economic - aesthetic interest. (Parag. VIII at 4).
22 | The interests of SDF are considerably broader in scope, including the
23 | use and enjoyment of the shoreline.

1
2 Identity of parties or privity is necessary before collateral
3 estoppel can be properly employed. Rains v. State, 100 Wn.2d 660, 665
4 (1983). A large measure of identity must exist for collateral
5 estoppel to be appropriate. State v. Dupard, 93 Wn.2d 268, 272
6 (1980). This is essential to ensure that any party collaterally
7 estopped has been given an opportunity to have its view-point fairly
8 heard. We conclude that insufficient identity and privity exists
9 to sustain collateral estoppel. See generally, Trautman, Claim and
10 Issue Preclusion in Washington (1985) 60 Wn. L.Rev. 805, 836 (1985);
11 Washington Digest Annotated, Judgments §§ 627-632, 706-712, 828(3.32),
12 and 949(4).

Bergh v. State, 21 Wn.App. 393 (1978), is not persuasive authority
14 for the majority opinion. In that case, the numbers were vastly
15 different than here: 19 fishermen in the current litigation, 15 of
16 whom were members of an association in previous litigation. There was
17 also no question of issue identity.
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VI

Given the errors in SHB No. 84-31, which required permit reversal, it would violate public policy and be unjust in this appeal to order partial summary judgment in this appeal. See, Mallard, supra; Dupard, supra; State v. Harris, 78 Wn.2d 894, 480 P.2d 489 (1971).

Judith A. Bendor 1/12/88
Judith A. Bendor, Member

Dennis McLerran [by JB]
Dennis McLerran, Member